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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Consideration of reports submitted by States parties under article 19 of the Convention

Addendum

Follow-up responses of Australia to the concluding observations of the Committee against Torture (CAT/C/AUS/CO/3)*

[29 May 2009]

* In accordance with the information transmitted to State parties regarding the processing of their reports, the present document was not formally edited.

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Paragraph 9 of the concluding observations

The State party should fully incorporate the Convention into domestic law, including by speeding up the process to enact a specific offence of torture at the Federal level. The State party should continue consultations with regard to the adoption of a Bill of Rights to ensure a comprehensive constitutional protection of basic human rights at the Federal level

Proposed enactment of a specific offence of torture in Commonwealth law

1. The Australian Government is intending to introduce legislation in 2009 to enact a specific offence of torture in Commonwealth law, following consultation with all States and Territories. The proposed offence would be based on the elements set out in the definition of torture in article 1 of the Convention against Torture. Enacting a specific offence would serve as further evidence of the Australian Government's condemnation of torture in all circumstances.

2. Australia's domestic criminal laws already contain offences which outlaw all acts of torture. As a party to the Convention, Australia is required to 'ensure that all acts of torture are offences under its criminal law' (art. 4). As indicated in previous periodic reports to the Committee against Torture, Australia meets its obligation in article 4 on the basis that all acts falling within the Convention's definition of torture are offences under State and Territory criminal laws. These acts include the infliction of bodily harm, murder, manslaughter, assault and other offences against the person. The Crimes (Torture) Act 1988 (Cth) currently criminalizes acts of torture committed outside Australia, but only Australian citizens or other persons who are present in Australia may be charged with such offences. Acts of torture that are committed anywhere in the world during the course of an armed conflict or as a crime against humanity are currently criminalized under the Criminal Code Act 1995 (Cth).

The National Human Rights Consultation

3. The National Human Rights Consultation is seeking the views of the Australian public on which human rights and responsibilities they consider important, whether they are currently sufficiently protected and promoted, and whether they could be better protected and promoted. The Consultation started in February and will run until mid-June 2009, with the Consultation Committee due to report to the Attorney-General by 31 August 2009. A significant issue arising for discussion is whether Australia should have a national charter or bill of rights and, if so, what rights should be listed.

Paragraph 10 (a) of the concluding observations

Ensure that the increased powers of detention of ASIO are in compliance with the right to a fair trial and the right to take proceedings before a court to determine the lawfulness of the detention

4. The Australian Government is firmly committed to ensuring that all proceedings, including terrorism-related proceedings, are conducted in accordance with Australia's fair trial obligations under international law. With respect, the Committee's observations about the increased powers provided to ASIO misunderstand the nature of these powers as being a measure of absolute last resort for gathering intelligence that is important in relation to a terrorism offence and fail to take account of the important safeguards set out in the Australian Security Intelligence Organisation Act 1979 (Cth) (the ASIO Act).

5. The ASIO questioning powers cannot be used to detain a person arbitrarily for renewable periods of seven days. The purpose of the ASIO questioning powers is not to

detain persons - it is to enable ASIO to question a person under a warrant where there are reasonable grounds for believing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence. A questioning warrant can only be sought if other methods of collecting the intelligence, including seeking the person's voluntary cooperation, would be ineffective.

6. In very limited circumstances a questioning warrant may also authorise the subject of the warrant to be taken into custody and detained by a police officer. A warrant may only authorise detention where there are reasonable grounds for believing that, if not immediately taken into custody and detained, the person may alert a person involved about the investigation of a terrorism offence; may not appear for questioning; or may destroy, damage or alter a record or thing the person may be requested to produce in accordance with the warrant. The power to detain is a subsidiary of the questioning power, and detention would be authorised only in the most exceptional cases where the effectiveness of a questioning warrant would otherwise be frustrated.

7. If a person is detained under a questioning warrant, the person would be brought into custody and detained by a police officer, who must make arrangements for the person to be immediately brought before a prescribed authority for questioning. The person can only be questioned while before the prescribed authority, and must be released from detention once questioning under the warrant has ceased.

8. Second or subsequent warrants in respect of the same person must be justified by information that is additional or materially different from that known to the Director-General of Security when the earlier warrants were issued, and must also be inspected by the Inspector-General of Intelligence and Security, who is an independent statutory office-holder responsible for oversight of Australia's security and intelligence agencies. Additionally, the subject of a warrant has a right to seek a remedy in a federal court at any time, and also has the right to make a complaint to relevant complaints bodies. The Inspector-General of Intelligence and Security is able to attend and observe questioning or the taking of the person into custody, and any concerns raised by the Inspector-General must be considered by the independent prescribed authority who presides over the questioning. The combination of these and other safeguards in the ASIO Act make it highly improbable that a person would be detained for renewable periods under an ASIO questioning warrant. It is also of note that no questioning warrants that authorise detention have been issued to date.

9. The concern about the lack of right to a lawyer of choice also misunderstands the provisions of the ASIO Act. The subject of an ASIO questioning warrant is entitled to contact a lawyer of choice, subject to some limitations that are necessary to ensure the protection of national security and the effectiveness of the questioning warrant. A person may be prevented from contacting a particular lawyer of choice if, on the basis of circumstances relating to that lawyer, there is a risk that a person involved in a terrorism offence may be alerted of the investigation, or a record or thing the person may be requested to produce under the warrant may be destroyed damaged or altered. If the person were prevented from contacting their first lawyer of choice, they would be entitled to request another lawyer of choice.

10. The Government regularly reviews and monitors the operation and effectiveness of counter-terrorism legislation, including ensuring compliance with human rights and international law. The operation, effectiveness and implications of the regime were extensively reviewed by the Parliamentary Joint Committee on Intelligence and Security. The Committee, which tabled its report in November 2005, recognized that the questioning regime has been useful, and that "the powers have been used within the bounds of the law and they have been administered in a professional way". Following the Committee's recommendation that the powers are effective and should continue to operate beyond the

original sunset period of July 2006, legislation was enacted to continue the powers for a further 10 years, at which time they will be subject to further review.

Paragraph 10(b) of the concluding observations

Guarantee that both preventative detention and control orders are imposed in a manner that is consistent with the State party's human rights obligations, including the right to a fair trial including procedural guarantees

Preventative detention

11. The preventative detention order regime under Division 105 of the Criminal Code Act 1995 (Cth) is subject to a number of safeguards to protect people's rights. A breach of any of the safeguards is itself a criminal offence. The safeguards include:

- Strict limits on the duration of detention (maximum of 48 hours);
- A prohibition on questioning during detention;
- Opportunities to contact a lawyer and family members and employer;
- A right to contact the Ombudsman and Australian Federal Police (AFP) Commissioner;
- Right to seek a remedy from a federal court in relation to the detention; and
- Consistent with international human rights standards, any person being detained must be treated with humanity and must not be subjected to cruel, inhuman or degrading treatment.

12. The legitimate aim of the preventative detention order regime is to protect the public from an imminent terrorist attack and to enable the Government to take action to preserve evidence immediately following a terrorist attack. The test that is imposed to ensure that a preventative detention order is not arbitrary is whether it is reasonable, necessary, proportionate and appropriate in all of the circumstances. If a senior member of the Australian Federal Police believes this test is met they may preventatively detain a person for 24 hours under an initial preventative detention order. In order to extend an initial preventative detention order, an AFP member must apply in writing to an issuing authority, who is an Administrative Appeals Tribunal member, Magistrate, Judge or retired Judge appointed by the Minister. Such an extension cannot be granted for more than 24 hours.

13. As far as secrecy is concerned, the detained person may only be prohibited from contacting relatives or associates if an issuing authority is satisfied there is an additional risk element in relation to such contact. A prohibited contact order is only to be issued where it is necessary to, for example, prevent harm to another person or prevent interference with the gathering of information about an impending attack.

14. If an individual has experienced unlawful discrimination in the exercise of the preventative detention provisions, a complaint can be made to the Australian Human Rights Commission and subsequently a federal court.

15. The Attorney-General is required to report to Parliament on how many preventative detention orders have been sought and/or granted each year. As of 29 May 2009, the preventative detention regimes have never been used.

Control order

16. In Australia, a court can only make a control order if it is satisfied that making the order would substantially assist in preventing a terrorist attack or that the person in question

has provided training to or received training from a listed terrorist organization. Control orders are aimed at protecting the community against the risk of a terrorist act.

17. The control order regime includes a number of safeguards to protect people's rights. These include:

- In deciding whether to issue a control order, a court must be satisfied on the balance of probabilities that each of the requirements of the control order are reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act;

- When determining the obligations, prohibitions and restrictions imposed, the court must have regard to their impact on the person's circumstances, including the person's financial and personal circumstances;

- An interim control order can be made *ex parte* but the court could choose to require the respondent to be present before an order is made;

- An interim control order does not come into effect until the affected person is provided with a copy;

- A person and their lawyer can obtain a copy of the control order and a summary of the grounds for the order;

- As soon as practicable, but at least 72 hours after the interim order is made, the court is required to confirm, make void or revoke the order. At this point the affected person may contest the order – if it is confirmed, the affected person can apply to the court for the order to be revoked, varied or declared void; and

- Control orders cannot apply to people under 16 and apply in a modified way to people between 16 and 18.

18. As with preventative detention, the Attorney-General is required to report on the number of control orders each year, including the particulars of any complaints made. As of 29 May 2009 a court has only made two control orders.

Paragraph 10(c) of the concluding observations

Ensure that accused remand prisoners are separated from convicted persons and are subject to separate treatment appropriate to their status as unconvicted persons

19. Pursuant to section 120 of the Australian Constitution, all decisions about the housing of federal offenders and suspects remanded in custody, whether they have been charged under counter-terrorism laws or not, are the responsibility of the Australian States and Territories. The classification of a particular prisoner is also a matter for State and Territory prison authorities. In classifying prisoners, factors taken into account include, but are not limited to, the seriousness of the charge brought against the person in question, the person's criminal antecedents and the State or Territory's duty of care to place the person in custody safely and securely.

20. The Standard Guidelines for Corrections in Australia comprise a uniform set of principles that are used by the States and Territories in developing their own relevant legislative, policy and performance standards on correctional practice. The Standard Guidelines state that where practicable, remand prisoners should not be put in contact with convicted prisoners against their will. Under the Standard Guidelines, remand prisoners should be given the opportunity to work and increased visitor access (at the discretion of the prison manager), among other privileges.

21. States and Territories endeavour to separate remand detainees from convicted prisoners wherever practicable. In Victoria, for example, in 2006 Corrections Victoria's commitment to separation was demonstrated by the opening of a 600-bed purpose-built facility for unconvicted male prisoners. In the Australian Capital Territory (ACT), section 19(2) of the Human Rights Act 2004 (ACT) requires an accused person to be segregated from convicted people. With the opening of the ACT's new prison, the Alexander Maconochie Centre, in March 2009, accused people and convicted prisoners are kept in separate accommodation. In New South Wales (NSW), the Crimes (Administration of Sentences) Regulation 2008 requires that each inmate is to be included in one of the following classes of inmates: (a) convicted inmates (b) unconvicted inmates, and (c) civil inmates; and that 'as far as practicable' inmates of any class are to be kept separate from inmates of any other class.

22. However, in some cases, it remains necessary to house remand and convicted detainees together. For example, in the Sydney Metropolitan Area, in NSW, unconvicted inmates are accommodated in specific correctional centres, however when these inmates are convicted and sentenced, they are returned to the centre in which they were accommodated prior to sentencing to await placement in a correctional centre appropriate to their classification. In these circumstances, in the short term, both unsentenced and sentenced inmates are accommodated in the same correctional centre. It should be noted that convicted inmates and accused remand inmates do not always form two separate and clearly identifiable cohorts. In fact, many inmates in NSW form a transition group, having been convicted of one or more charges whilst simultaneously being on remand for other unrelated charges that are proceeding through the court system. These inmates are classified as convicted inmates, but are often held with unconvicted inmates in remand facilities to facilitate transport to and from courts and visits from their legal representatives. Additionally, a small number of convicted inmates may be held in a predominantly remand correctional centre to provide stability in the provision of essential services such as food distribution and accommodation maintenance. A small number of remand inmates may also be held in a predominantly convicted-inmate correction centre for the short interval between their arrest and transfer to a remand correction centre.

23. The need to house inmates of a like status, such as those on protection or those convicted of sex offences, also places additional pressure on the correctional system in terms of the placement of inmates.

24. In Western Australia, regulation 57 of the Prisons Regulations 1982 directs that a prisoner on remand shall as far as practicable and where the interests of security permit, be kept separate from sentenced prisoners. Remand class prisoners (including prisoners who are either unconvicted, or convicted but not sentenced) are currently housed within 13 separate adult prisons throughout Western Australia. Their security classifications and placement needs vary considerably, and these factors, together with the limited facilities available, do not allow for provision of accommodation separate from sentenced prisoners and remand/sentenced prisoners. Every effort is made by prison staff to accommodate specific needs of individual remand class prisoners, and all remand prisoners are treated in accordance with appropriate legislative requirements.

Paragraph 11 (a) and (b) of the concluding observations

The State party should:

(a) Consider abolishing its policy of mandatory immigration detention for those entering irregularly the State party's territory. Detention should be used as a measure of last resort only and a reasonable time limit for detention should be set;

furthermore, non-custodial measures and alternatives to detention should be made available to persons in immigration detention;

(b) Take urgent measures to avoid the indefinite character of detention of stateless persons.

Mandatory immigration detention

25. Immigration detention of unlawful non-citizens in Australia is required by the Migration Act 1958 (Cth) (the Act) and is intended to support the integrity of Australia's immigration programme. It is an essential component of strong border control. This detention is administrative in nature and is not used for punitive or correctional purposes.

26. On 29 July 2008, the Minister for Immigration and Citizenship announced substantial changes to Australia's detention and asylum policies, including the introduction of the following key immigration detention values to guide and drive future immigration detention policy and practice:

1. Mandatory immigration detention is an essential component of strong border control;

2. To support the integrity of Australia's immigration program, three groups will be subject to mandatory immigration detention:

(a) All unauthorised arrivals, for management of health, identity and security risks to the community;

(b) Unlawful non-citizens who present unacceptable risks to the community; and

(c) Unlawful non-citizens who have repeatedly refused to comply with their visa conditions

3. Children, including juvenile foreign fishers and, where possible, their families, will not be detained in an Immigration Detention Centre (IDC);

4. Detention that is indefinite or otherwise arbitrary is not acceptable and the length and conditions of detention, including the appropriateness of both the accommodation and the services provided, will be subject to regular review;

5. Detention in IDCs is only to be used as a last resort and for the shortest practicable time;

6. People in immigration detention will be treated fairly and reasonably within the law;

7. Conditions of immigration detention will ensure the inherent dignity of the human person.

27. The Australian Government's risk-based approach to immigration detention focuses on the prompt resolution of cases rather than punishment. The values commit he Government to detention as a last resort, to detention for the shortest practicable period and the rejection of indefinite or otherwise arbitrary detention.

28. In accordance with those values, conditions of immigration detention have been enhanced to ensure the inherent dignity of the human person, including an increase in the use of alternative detention within the community in instances where individuals do not present unacceptable risks to the community and comply with conditions placed on them.

29. Flexible immigration detention options include Immigration Residential Housing (IRH), Immigration Transit Accommodation (ITA), alternative places of detention and community detention (residence determination). While these immigration detention options remain "immigration detention" in a legislative sense and still require a level of security and restriction of liberty, these alternatives are less intrusive than other detention options.

30. Further visa options are being developed so that unlawful non-citizens can resolve their immigration status while lawfully in the community rather than in immigration detention. In instances where individuals must be detained, placement in an IDC is used as a last resort and for the shortest practicable time.

31. Further initiatives currently being pursued include a risk-based method for determining placements for people in immigration detention; enhancements to case management services to ensure that durable immigration outcomes are obtained for clients; and improvements to the delivery of health and mental services.

Measures to avoid indefinite character of detention of stateless persons

32. Australia acknowledges past failures to resolve the status of stateless people in a timely manner, involving in some cases, protracted periods of detention.

33. The New Directions in Detention policy announced by the Minister for Immigration and Citizenship on 29 July 2008 highlighted that immigration detention that is indefinite or otherwise arbitrary is not acceptable. A copy of this announcement is available at <http://www.minister.immi.gov.au/media/speeches/2008/ce080729.htm>.

34. Increased focus on prompt case resolution is an important step in ensuring that past failures are not repeated. All efforts are being made to progress the cases of unlawful non-citizens, including those persons who may be stateless.

35. The Minister for Immigration and Citizenship has asked his department (the Department of Immigration and Citizenship (DIAC)) for advice and options on how Australia may best meet its obligations under the Convention on the Status of Stateless Persons and the Convention on the Reduction of Statelessness. This will include a consideration of approaches taken by other States to assist with identifying the most appropriate mechanism for the Australian context.

Paragraph 25 (a) and (b) of the concluding observations

The State party should:

(a) Abide by the commitment that children no longer be held in immigration detention centres under any circumstances. Furthermore, it should ensure that any kind of detention of children is always used as a measure of last resort and for a minimum period of time;

(b) As a matter of priority, ensure that asylum-seekers who have been detained are provided with adequate physical and mental health care, including routine assessments.

Children in immigration detention

36. Australia takes its human rights obligations relating to children very seriously.

37. In June 2005, Australia reformed the management of immigration detention to enable families with children to live in the community under alternative detention arrangements while their visa status was resolved.

38. In 2008, Australia took these reforms further by introducing a range of reforms to Australia's immigration detention system, including the introduction of seven key immigration detention values (as described in the Government's response to concluding observation 11).

39. In accordance with those values, the Australian Government policy is that children and, where possible, their families, will not be detained in an immigration detention centre under any circumstances. All families with children who enter into immigration detention are referred to the Minister for Immigration and Citizenship for possible consideration for Community Detention arrangements as soon as practicable, once health, security and identity requirements are satisfied.

40. While there will be occasions when children will be accommodated in low security facilities within the immigration detention framework, such as immigration residential housing (IRH) and immigration transit accommodation (ITA), the priority will always be that children and their families will be promptly accommodated in community detention. This arrangement allows children and their families to move about in the community and receive support from Non-Government Organisations (NGOs) and state welfare agencies, as necessary.

41. The policy priority continues to be the resolution of children's status at the earliest possible juncture.

42. This policy also encompasses those who arrive as unauthorised boat arrivals at locations known as excised offshore places and are accommodated on Christmas Island.

43. The Australian Government considers that this measured approach strikes a balance between operating a migration programme with integrity whilst also ensuring that the welfare of children is paramount.

Community detention arrangements

44. When families are placed in Community Detention, they are unsupervised and can freely move in the community, subject to conditions that they reside at a specified address and maintain contact with DIAC.

45. DIAC works with NGOs to make sure that individuals placed in Community Detention are properly supported and have access to various services. NGOs are funded by DIAC to source housing for these persons and allow payment of their bills and other living expenses. NGOs also provide case officers to assist people living in Community Detention and to ensure they have access to the relevant services, including general medical services, pre-approved specialist services and social support networks.

46. In line with community standards, children in Community Detention have access to primary and secondary schooling as well as access to English language classes. Informal community-based education for adults is supported and encouraged.

Unaccompanied minors

47. Unaccompanied minors are case managed to ensure that appropriate care, accommodation and guardianship arrangements are made to safeguard the best interests of the child.

48. In all cases, minors are not detained in immigration detention centres.

49. Where unaccompanied minors apply for protection visas, their care and guardianship are facilitated, where necessary, through the Unaccompanied Humanitarian Minors program in partnership with relevant state government authorities.

50. Unaccompanied minors on the Australian mainland are assessed, in the first instance, for a Bridging visa to facilitate living in the community. 51. If an unaccompanied minor is not eligible for a Bridging visa, then Community Detention options are arranged as soon as practicable. Unaccompanied minors are placed in Community Detention under the supervision of a suitably qualified live-in foster carer, whilst resolution of their migration status is determined.

52. In line with community standards, unaccompanied minors have access to primary and secondary schooling as well as access to English language classes.

Immigration detention arrangements on Christmas Island

53. Minors on Christmas Island, whether part of a family or unaccompanied, are initially accommodated in alternative detention arrangements. As for minors who arrive in the migration zone, the policy priority continues to be the resolution of children's status at the earliest possible juncture. To this end, priority processing is provided in relation to health, identity and security checks. Once the initial entry screening interviews are completed, minors are placed in Community Detention and, if unaccompanied, with live-in foster carers.

54. In line with community standards, children in Community Detention have access to primary and secondary schooling as well as access to English language classes. Informal community-based education for adults is supported and encouraged.

Physical and mental health care for asylum-seekers who are detained

55. DIAC monitors the general and mental health needs of all people in immigration detention, including asylum-seekers, to ensure that models of health care and health resources are appropriate to meet people's needs.

56. DIAC contracts a Health Services Manager to provide general primary health care and mental health services to people in immigration detention facilities. Services such as public health screening and acute hospital admissions for both physical and mental illness are generally provided by state and territory health departments.

57. DIAC has Memorandums of Understanding or agreements in principle with state and territory health departments to ensure that hospital services are provided at a level commensurate with that provided to the wider community.

58. Over the past three years, DIAC has worked closely with stakeholders, particularly the Detention Health Advisory Group (DeHAG) to develop improved mental health provision for people in immigration detention. This has included the implementation of an integrated mental health delivery model, which provides for comprehensive mental health assessment by clinicians and appropriate care planning and follow-up.

59. The DeHAG consists of the key health and mental health professional and consumer group organisations, and is chaired by Associate Professor Harry Minas who is also a member of the Immigration Detention Advisory Group (IDAG). The DeHAG has nominees from all the key health professional organisations including the Australian Medical Association, the Royal Australian and New Zealand College of Psychiatry, the Royal College of Nursing Australia, the Public Health Association, the Royal Australian College of General Practitioners and the Ombudsman's Office, which has observer status. The DeHAG currently has one sub-group focussing on mental health.

60. More recently, the work of DeHAG has focussed on a review of mental health screening to improve identification of trauma and ensure that re-screening occurs at appropriate trigger points. A new regime of mental health screening is currently being implemented as a result of this work. Policy is also being developed on the prevention of

self harm and the identification and management of people who are survivors of torture and trauma.